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The FCC and AIDS Education: Helping Broadcasters Serve the Public Interest

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NOTE

The FCC and AIDS Education: Helping Broadcasters Serve the Public Interest

Jason B. Acton^{*}

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[A] "conspiracy of silence" continues to surround HIV/AIDS which keeps couples and communities unaware that AIDS is in their midst, and allows governments to close their eyes to the urgent need for action. It keeps HIV off the agendas it should be on, and fosters an "us versus them" mentality in which the uninfected deny the existence, the human value and the dignity of the infected.¹

I. INTRODUCTION

More than fifteen years after Acquired Immune Deficiency Syndrome (AIDS) was first discovered, the disease remains a very real and dangerous health threat. Despite recent medical advances that have helped to prolong the lives of those who are infected with the Human Immunodeficiency Virus (HIV), the virus which causes AIDS, no cure is available for the disease.² Moreover, the complexity of the HIV virus makes it unlikely that a vaccine or cure will be available in the coming years.³ Thus, education remains the primary weapon available in the war against the spread of the virus.

However, in the wake of underfunded and scattered AIDS education initiatives, the Centers for Disease Control (CDC) now estimates that over 775,000 Americans are infected with HIV.⁴ Further, recent studies show that HIV infection rates continue to rise for heterosexual men and women.⁵ Studies also indicate that increasing numbers of American youth, especially young, gay males, are under the false assumption that new AIDS drug treatments represent a "cure" for the disease. Consequently, they are engaging in unsafe sexual practices (primarily sex without a condom), prompting fears that the gay community could see increasing HIV infection rates as well.⁶ The continued threat that AIDS presents to our society prompted Secretary of Health and Human Services Donna Shalala to note, "[W]e're finally seeing deaths go down, but it's not good enough. Too many people are still dying, and too many people are still getting infected. The new drugs don't work for everyone. We must still focus on preven-

1. Susan Timberlake, *Human Rights and HIV/AIDS: UNAIDS at the UN Commission on Rights*, WORLD HEALTH, Sept. 19, 1996, at 24.

2. See Thomas H. Maugh II, *Drug Cocktail Can't Eliminate HIV, Experts Say*, L.A. TIMES, Nov. 14, 1997, at A1.

3. *Id.*

4. See Lisa M. Krieger, *Studies Show Mixed Results for Drug Combo*, S.F. EXAMINER, Oct. 1, 1997, at A4.

5. See Marlene Cimon, *New AIDS Cases Show Decline in U.S.*, L.A. TIMES, Sept. 19, 1997, at A12.

6. An increasing number of gay males are engaging in sex without condoms, which is known as "barebacking." See Marc Peyser, *A Deadly Dance: As AIDS Cases Decline Sharply, Some Gay Men Are Returning to Unsafe Sex*, NEWSWEEK, Sept. 29, 1997, at 76.

tion.”⁷

Both the CDC and the World Health Organization (WHO) have recognized that, in the absence of an HIV vaccine, the key to preventing escalating infection rates is a well-coordinated and frank education program.⁸ However, the attempt these organizations have made to enlist the help of broadcast stations in AIDS education programs has not been successful. Despite the fact that broadcasters have a legal obligation to act in the public interest, they have been reluctant to fully and properly educate the public about HIV and AIDS for fear of offending viewers. Instead, the broadcasters have focused on sensational reports about the disease, such as the highly unlikely transmission of the virus through dental procedures,⁹ rather than on the common modes of HIV transmission—unprotected sex and needle sharing. Broadcasters have been especially unwilling to promote HIV education initiatives aimed at homosexuals, who comprise the largest single group of AIDS sufferers,¹⁰ because of their apprehension of angering antigay conservative activists. As a result of the broadcasters’ unwillingness to promote meaningful AIDS education programming, an important weapon in the war against the spread of HIV has been lost.

The broadcasters’ failure to promote AIDS education programming is especially troublesome because they are required by law to act in the public interest.¹¹ As the first broadcast stations were established, they were given very precious and scarce portions of the broadcast spectrum for free. In exchange for this free spectrum space, the Communications Act of 1934 “required the FCC to grant and renew licenses to use the electromagnetic spectrum only after determining whether the ‘public interest, convenience, and necessity’ will be served.”¹²

Through the years, the FCC has struggled to define exactly what is in the public interest. The FCC’s main policy statement provides only that “broadcasters have an obligation ‘to provide programming that responds to

7. See Marlene Cmons, *AIDS Death Rate in U.S. Declines for First Time*, L.A. TIMES, Feb. 28, 1997, at A1.

8. See Jonathan M. Mann, *AIDS and Discrimination*, WORLD HEALTH, Apr. 1989, at 6.

9. See Jayne Garrison & Lisa Krieger, *Dentist’s Drill New Culprit*, S.F. EXAMINER, July 14, 1991, at B4.

10. See Amanda Bennett & Anita Sharpe, *CDC and AIDS, What It Said and How Prevention Efforts Missed the Mark*, ATLANTA J. & CONST., May 2, 1996, at A12.

11. Reed Hundt & Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children’s Educational Television*, 9 HARV. J.L. & TECH. 11, 12 (1996).

12. Reed E. Hundt, *The Public’s Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1089 (1996); see also Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1102 (1993).

issues of concern to the community.”¹³ Unfortunately, this statement offers little insight into what actions a broadcaster must take in order to appropriately operate in the public interest. As a result, broadcasters have typically not been forced to do much to comply with this mandate. However, the FCC has recently taken steps to ensure that broadcasters actually act in the public interest. According to former FCC Chairman Reed Hundt, the public interest requirement, at a minimum, calls for educational programming for children, political public affairs programming, and limitations on the presentation of indecent and violent programming.¹⁴

Unfortunately, the areas the FCC has targeted for requiring broadcasters to meet the public interest are underinclusive. Given the current world health crisis involving the HIV virus, it is critical that the FCC and Congress work together to require broadcasters to educate the public about the dangers associated with AIDS. Proper education about HIV and AIDS is the keystone in preventing the continued escalation of the health crisis.¹⁵ Broadcasters are in a distinct position to disseminate large amounts of accurate and valuable HIV information to mass numbers of people. Their participation in the AIDS education initiative is essential if real and meaningful progress is to be made in stemming the rising infection rates.

This Note analyzes what role the FCC and Congress should play in pushing broadcasters to become involved in AIDS education programs. Part II of this Note examines the history of the HIV virus, its appalling impact on the world and the United States, how broadcasters have attempted to inform the public about this health crisis, and what role they can play to help curb the increasing infection rate. Part III discusses the history and background of the broadcast license renewal process and what the public interest requirement for license renewal requires of a broadcaster. This section also evaluates the constitutional validity of FCC regulatory attempts. Finally, Part IV of this Note discusses the problems the FCC faces in implementing an AIDS educational requirement and how these problems should be properly addressed.

II. THE HIV/AIDS HEALTH CRISIS

Scientists and doctors first recognized the presence of what is now

13. Hundt & Kornbluh, *supra* note 11, at 13 (quoting Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial TV Stations, *Report and Order*, 98 F.C.C.2d 1075 (1984)).

14. James T. Hamilton, *Private Interests in "Public Interest" Programming: An Economic Assessment of Broadcast Incentives*, 45 DUKE L.J. 1177, 1179 (1996).

15. See Mann, *supra* note 8.

known as the HIV virus in the early 1980s.¹⁶ The first known cases of the disease can be traced back to 1981 when a series of previously healthy homosexual men in California suddenly died after their immune systems mysteriously collapsed and left their bodies defenseless against illness. In the early days of the epidemic, very little was known about the disease except that the only reported cases of it were in gay men. For this reason, researchers at the CDC first called HIV the Gay-Related Immune Deficiency (GRID).¹⁷ Given that the disease seemed only to be affecting gay males, scant attention was paid to the health crisis by the mainstream news media or government officials. However, evidence of the disease soon began to appear in persons other than homosexuals and the AIDS epidemic became a grim reality for all Americans.¹⁸

The early years of the HIV crisis were marked by confusion and ignorance among the general public concerning how AIDS was transmitted.¹⁹ Nonetheless, scientists made important in-roads into understanding how the virus functioned by the mid-1980s. Researchers established that the HIV virus was only transmitted through intimate sexual contact or through invasive exposure to infected blood, semen, or breast milk.²⁰ However, the government response to this information was poorly managed. The conservative Reagan Administration, fearful of promoting immoral conduct, stymied CDC attempts to launch broad-based AIDS education initiatives.²¹ As a result, the public was poorly informed about how HIV could be transmitted and HIV infection rates continued to climb. Moreover, this lack of proper information led many to irrationally discriminate against those who were HIV positive. Some schools prohibited HIV positive students from attending classes,²² companies dismissed workers with AIDS,

16. See *Kaposi's Sarcoma and Pneumocystis Pneumonia Among Homosexual Men—New York City and California*, 30 MORBIDITY & MORTALITY WKLY. REP. 305 (1981).

17. See Marc Barnes, *Toward Ghastly Death; The Censorship of AIDS Education*, 89 COLUM. L. REV. 698, 698 n.1 (1989) (reviewing RONALD BAYER, *SOCIAL ACTS, SOCIAL CONSEQUENCES: AIDS AND THE POLITICS OF PUBLIC HEALTH* (1989) and SIMON WATNEY, *POLICING DESIRE: PORNOGRAPHY, AIDS AND THE MEDIA* (1987)).

18. *Id.*

19. Penn Lerblance, *Legal Redress for Disability Discrimination: Bob, Carol, Ted and Alice Encounter AIDS*, 24 GOLDEN GATE U. L. REV. 307, 312 (1994).

20. See *id.* at 313.

21. See Ronald Bayer, *Rethinking Aspects of AIDS Policy*, 11 J. CONTEMP. HEALTH L. & POL'Y 457 (1995).

22. The most widely publicized of these cases involved Indiana teenager Ryan White, who contracted AIDS through a blood transfusion. In 1984, school officials in Kokomo, Indiana barred the 13 year-old student from attending classes for fear he would spread the disease. A judge later ruled that the school district's action was unlawful, and White eventually was allowed to return to school. However, even after the judicial order, White was subjected to continued harassment from parents and students, and his mother was forced to

and many health care workers refused to treat individuals infected with the HIV virus because of their own personal fear of catching the disease.²³

Today, over a decade and a half since the disease first emerged in this country, AIDS continues to greatly impact our society. However, in this time, scientists have learned much more about the HIV virus. It is now known that after one is infected, the HIV virus attacks and destroys the body's immune system. Once enough of the immune system has been compromised and the body loses the ability to fight off the opportunistic infections it once could, the individual develops full-blown AIDS.²⁴ With the development of full-blown AIDS, one's body often becomes ravaged by cancers, rare viruses, and pneumonia. At this stage of the disease, doctors are able to do little to help the AIDS sufferers, except to make them as comfortable as possible while the infections take a deadly toll on their bodies.

Generally, the period of time between HIV infection and the onset of AIDS is relatively long. On average, it takes more than ten years for one infected with HIV to develop full-blown AIDS.²⁵ However, an individual who is only HIV-infected and not AIDS-symptomatic will usually exhibit only minor symptoms of the disease, such as a sore throat or cold, allowing an individual to be HIV-positive and yet unaware of his or her condition.²⁶ Consequently, without being tested for the presence of HIV antibodies in the blood,²⁷ HIV-positive individuals can transmit the virus to others without even knowing they have the virus themselves.

Through advances in medical technology, researchers have been able to develop treatments to help HIV-infected persons fight the advance of the virus in their bodies. A new series of drugs known as protease inhibitors, which are administered in combination (often referred to as a "drug cocktail"), have shown a remarkable ability to lower the level of the HIV virus in an infected individual's body, and as a result, prolong his or her life.²⁸ In fact, the introduction of the protease inhibitors has been widely

move the family out of Kokomo to a more accepting community. White's circumstances drew national media attention, and he was befriended by celebrities such as Elton John and Michael Jackson. See *AIDS Hero Ryan White Is Dead at Age 18*, *Indiana Teen-ager Fought Five Year Battle Against Disease and Intolerance*, S.F. EXAMINER, Apr. 9, 1991, at A1.

23. See Lerblance, *supra* note 19, at 310-11.

24. *Id.* at 309 n.1.

25. See William Hamilton, *In San Francisco, Grim AIDS Cycle Poised for Encore*, WASH. POST, Aug. 29, 1994, at A1.

26. See AIDS LAW AND POLICY: CASES AND MATERIALS 24-25 (Arthur S. Leonard et al. eds., 1995).

27. By the mid-1980s, researchers had developed ways to screen the blood for the presence of HIV antibodies. *Id.*

28. See Maugh, *supra* note 2; see also David Brown, 'Triple Therapy' Doesn't Destroy

heralded in the media as the possible beginning of the end to the AIDS epidemic.²⁹ Their use is partly credited with the surprising decrease in the number of AIDS deaths in 1996 and 1997.³⁰ However, as Dr. Jim Curran, Dean of the Emory School of Public Health and former head of the CDC's AIDS research group noted, "[i]t's important to recognize that there were still 22,000 deaths' [from AIDS] in the first half of 1996 [The new drugs] may be allowing people to be healthy longer, but not necessarily indefinitely."³¹

Furthermore, serious problems exist with the use of the protease inhibitors. Unfortunately, the new "drug cocktail" is only successful in about half of those who are HIV-positive.³² Additionally, even when successful, the use of drugs does not rid the body of the HIV virus.³³ A reservoir of the virus remains present in the body at all times. If at any point a person strays from the strict drug regimen, or the drugs prove to be ineffective at some future point, the virus can rebound and attack the body with amazing speed.³⁴ Moreover, the cost of the drug therapy, which exceeds \$15,000 per year, has proven to be a substantial barrier to more widespread use of the drugs.³⁵ Many people simply cannot afford to use this expensive drug therapy.

Despite recent advances in medical treatments for HIV-infected individuals, scientists remain pessimistic that a cure for the virus will be available in the near future.³⁶ The complexity of the virus has made it difficult for medical researchers to find a way to rid the body of HIV.³⁷ Thus, without the presence of a cure for the virus, health officials have instead focused their energy on trying to educate the public about how one can avoid becoming exposed to the HIV virus. Since the virus can only be passed through an exchange of bodily fluids, one is only at risk for the disease if

HIV, WASH. POST, Nov. 14, 1997, at A4.

29. See Mark Schoofs, *Epidemics of Misunderstanding: Why It's Too Soon To Declare the End of AIDS*, WASH. POST, Dec. 15, 1996, at C1; see also Christine Gorman, *What, I'm Gonna Live?*, TIME, Oct. 14, 1996, at 77.

30. See Sabin Russell, *AIDS Deaths Drop 60% in California: Wide Distribution of New Drugs Credited*, S.F. CHRON., Jan. 9, 1998, at A1.

31. Anne Rochell, *Despite Lack of Accepted 'Cure', People with AIDS Living Longer*, ATLANTA J. & CONST., Feb. 28, 1997, at A17.

32. See Lisa M. Krieger, *AIDS Drug Cocktails Fail 53% in Study*, S.F. EXAMINER, Sept. 29, 1997, at A1.

33. See Lisa M. Krieger, *Suppressed HIV Still Lurks in Body*, S.F. EXAMINER, Sept. 17, 1997, at A6.

34. See Maugh, *supra* note 2.

35. *Id.*

36. *Id.*

37. See Gorman, *supra* note 29.

one engages in unprotected sex, receives a blood transfusion containing contaminated blood, shares a needle during intravenous drug use, or exposes an open sore or cut to infected blood or semen.³⁸

Unfortunately, the health officials' education initiative has met with limited success. To many people, AIDS is still a disease that affects gay males and drug users.³⁹ This misconception has led to a continued escalation of the HIV infection rate in heterosexual men and women.⁴⁰ Further, as a result of the failed education program and its inability to properly educate Americans about the perils of the disease, AIDS is now the leading cause of death for persons ages twenty-five to forty-four.⁴¹ Additionally, a recent rise in gonorrhea infections among young gay men suggests that increasing numbers of gay youth are engaging in risky sexual behavior that could lead to a resurgence of the disease among the gay community.⁴² Rising rates of infection and an increase in the number of groups at serious risk of contracting the disease clearly indicate that AIDS remains a very serious public health crisis.

A. *The Response to the AIDS Epidemic*

Given the fact that the largest portion of current HIV positive individuals are members of historically discriminated-against groups, including gays, African-Americans, Latinos, and drug users, it is no surprise that society has used its fear of the HIV virus to further discriminate against those with the virus. This fear has commonly been both irrational and judgmental. For example, in the summer of 1995, Secret Service agents felt the need to wear rubber gloves when admitting gay political officials to a White House conference because they feared the gay leaders had AIDS (even though none of the conference participants was indeed HIV-positive).⁴³ While Clinton administration officials quickly denounced the

38. See AIDS LAW AND POLICY, *supra* note 26, at 29.

39. Michael H. Merson, *Returning Home: Reflections on the USA's Response to the HIV/AIDS Epidemic*, 347 LANCET 1673, 1673 (1996).

40. Krieger, *supra* note 4.

41. *Mortality Attributable to HIV Infection Among Persons Aged 25-44 Years—United States 1994*, 45 MORTALITY AND MORBIDITY WKLY. REP. 121.

42. Recently, many cities, including San Francisco, Seattle, San Diego, and Atlanta, reported alarmingly high numbers of gonorrhea among gay men. This statistic is particularly troublesome because the same unsafe-sex practices that are responsible for the spread of gonorrhea, also can spread the HIV virus. See Lisa M. Krieger, *Rising Gonorrhea Rate Spurs HIV Fears*, S.F. EXAMINER, Sept. 25, 1997, at A1. In addition, a recent survey of gay men found that close to half of all those polled admitted to having engaged in unprotected intercourse in the last year, one of the primary modes of HIV transmission. See Lisa M. Krieger, *Many No Longer See Unsafe Sex as Taboo*, S.F. EXAMINER, Jan. 4, 1998, at A1.

43. Al Kamen, *Guards Don Gloves as Gay Officials Visit White House*, WASH. POST,

Secret Service actions, the damage had already been done.

Unfortunately, the White House incident represents the typical societal reaction to AIDS, and therefore it is not surprising that many other discriminatory acts have been taken against HIV-positive individuals. Some of these have included attempts to keep HIV persons from being able to marry,⁴⁴ work, attend school, or serve in the armed forces.⁴⁵ Additionally, many AIDS sufferers are unable to obtain insurance because of discriminatory practices by the insurance industry.⁴⁶

In essence, the fear of AIDS sufferers has been "used to articulate profound social fears and anxieties, in a dense web of racism, patriotism, and homophobia."⁴⁷ The widespread discrimination against persons with AIDS has unfortunately led many who are at risk for the virus to forgo testing for fear of what will happen to them if they test positive. As an official at the World Health Organization noted, "if HIV infection . . . leads to stigmatization and discrimination . . . persons already HIV infected and those concerned that they may be infected will actively avoid detection, and contact with health and social services will be lost."⁴⁸ Losing this contact is problematic because it interferes with a prime opportunity to educate an HIV positive individual on how to avoid infecting others.

From the start, the AIDS crisis has been as much a political debate as a health crisis. Religious leaders and social conservatives have attempted to use the AIDS issue to return America to what they feel is a traditional state of "morality." Senator Jesse Helms (R-N.C.), one of the most powerful and vocal members of the United States Senate,⁴⁹ has used AIDS as a means to condemn homosexuality. While attempting to cut funding for AIDS research, Helms asserted that AIDS was caused only by "the deliberate, disgusting and revolting" actions of homosexuals.⁵⁰ Moreover, according to Helms, AIDS prevention programs in the public schools and federal offices are nothing more than "thinly veiled attempts to restructure values of American families in favor of the homosexual lifestyle."⁵¹ Even

June 15, 1995, at A1.

44. T.E.P. & K.J.C. v. Leavitt, 840 F. Supp. 110 (C.D. Utah 1993).

45. See Lerblance, *supra* note 19 at 309-12.

46. See Lisa M. Krieger, *Most HIV Patients Have No Insurance*, S.F. EXAMINER, Sept. 24, 1997, at A4.

47. Barnes, *supra* note 17, at 702 (quoting SIMON WATNEY, *POLICING DESIRE: PORNOGRAPHY, AIDS AND THE MEDIA* 6 (1987)).

48. Mann, *supra* note 8, at 7.

49. Senator Helms currently serves as the Chairman of the Foreign Relations Committee. He was re-elected to the Senate for a fifth term in 1996. See Carol D. Leonnig & Jim Morrill, *Senator Stands Fast in Tide*, CHARLOTTE OBSERVER, Nov. 6, 1996, at A1.

50. Helen Dewar, *Helms Attacks on AIDS Bill Fail*, WASH. POST, July 28, 1995, at A1.

51. *Id.*

in light of scientific proof to the contrary, Helms has remained steadfast in his belief that homosexuals are the cause of AIDS, and he has used his power to block attempts to promote honest AIDS education. In response to the social conservatives and far right religious activists like Helms, gay activists have been pushed to protect gay civil rights. Additionally, civil libertarians have been forced to vigorously protect the rights of those who are HIV-positive from infringement by irrational and unconstitutional laws. In the end, all of this political wrangling has left the general public even more confused about the disease and has allowed politics to interfere with important education initiatives.

The American response to the AIDS epidemic has simply not been effective. Our society has "turned a public health crisis into a moral commentary equating disease with sin."⁵² As former World Health Organization AIDS Programme Director Michael Merson noted, "When it comes to prevention, school boards . . . are fearful of discussing sexual behaviour in the classroom—despite the fact that one in four new HIV infections now occur in people under age 21, [and] television shows most watched by American teenagers contain 2000 references to sexual intercourse and the like yearly"⁵³

Moreover, broadcasters have been fearful of discussing AIDS and AIDS prevention in overly graphic detail for fear of offending viewers. Under pressure from religious conservatives, broadcasters have been especially fearful of taking any actions that may appear to promote sex outside of marriage. The broadcast networks have consistently refused to run condom advertisements,⁵⁴ have not included realistic AIDS storylines in their television series, and have not taken steps to fully inform the public as to how AIDS is really transmitted. They have allowed their concern over offending certain conservative viewers to interfere with effective HIV education. Thus, their response to the AIDS crisis has been woefully inadequate.

B. The Need for More Effective AIDS Education Initiatives

With the AIDS crisis continuing to escalate, it is critical that our society take realistic and concrete steps toward lowering infection rates. Given that no cure exists for AIDS and that no cure seems likely to be available in the next few years, it is important to continue to focus our energies on educating the public as to how the disease is transmitted. Cur-

52. Merson, *supra* note 39, at 1674.

53. *Id.* at 1673.

54. See Chris Reidy, *WCVB-TV Plans To Air Condom Ad*, BOSTON GLOBE, Oct. 16, 1996, at B1.

rently, education is the only real weapon against HIV transmission. Through educational initiatives, we will hopefully not only lower the transmission rates, but also improve and enhance societal acceptance of AIDS sufferers. There is a chance that this will help to end the shameful discrimination and hatred that is practiced against those who are HIV-positive.

In the promotion of more effective education initiatives, broadcasters and the FCC can play a key role. Broadcast stations are in a unique position to shape public understanding about the disease. As such, they should be expected to help the public get the true facts about the disease. Broadcast stations should be obligated, as part of the public interest requirement in having their broadcast licenses renewed, to promote a better understanding of the HIV/AIDS health crisis. The FCC should monitor broadcasters' education attempts and ensure that a broadcaster's license is renewed only when they meet the goal of properly and honestly informing the public about this health crisis.

For broadcasters, this AIDS educational programming could include writing realistic AIDS plots into existing or new television series (such as NBC has done with its top-rated program, *ER*), providing new and different public service announcements that more accurately promote protection against transmission, allowing condom makers to advertise their products on the air (so as to promote a better understanding of the benefits of safe sex), or the airing of documentaries and news programs devoted to educating the public about the disease. Ideally, broadcasters would attempt to get the AIDS education message out to the public in each of these ways. However, a broadcaster should have full discretion to decide how to air this message. In this way broadcasters can tailor HIV education programs so as to avoid offending sensitive viewers, while not sacrificing the promotion of important AIDS education. In the end, it will be up to the FCC to monitor the actions of broadcasters in this regard and make sure they meet the reasonable public expectation of attempting to better educate the public about the AIDS crisis.

III. BROADCASTERS' REQUIREMENT TO TAKE THE PUBLIC INTEREST INTO ACCOUNT

By the terms of their licenses, broadcast stations are required to take the "public interest" into account.⁵⁵ Under the conditions of the Communications Act of 1934, broadcasters were handed this responsibility in exchange for being given scarce space on the electromagnetic spectrum for

55. See, e.g., Hundt & Kornbluh, *supra* note 11.

free.⁵⁶ However, throughout the last fifty years, the FCC has required precious little of broadcasters in order to meet this requirement.

In the 1980s, under former FCC Chairman Mark Fowler, the FCC allowed broadcasters total freedom to determine what is in the public interest. According to Fowler, the television was nothing more than "a toaster with pictures,"⁵⁷ and as such the market could accurately determine what is in the public interest.

However, this hands-off approach to the public interest mandate quickly produced some very disturbing results. It was under Fowler's system of regulation that broadcasters became much more concerned with advertising revenue than with the "public interest." This monetary concern led some stations to claim that *The Jetsons* and *GI Joe* cartoons actually represented educational programming for children.⁵⁸ Moreover, the FCC's failure to require broadcasters to act in the public interest led to a noticeable decline in the presentation of any issue deemed "controversial," such as discussions of safe sex, even though such a discussion would benefit the public as a whole. Broadcasters worked only to improve their bottom line by maintaining high ratings, holding little regard for the promotion of significant issues in the public interest.

The failure to require broadcasters to serve the public interest had serious consequences. Prior FCC leadership contended that this approach led to a noticeable and alarming decline in the quality of children's educational programming.⁵⁹ Furthermore, many blamed this lack of a meaningful public interest standard for the rise in violent television programming during time periods when high numbers of impressionable children were watching.⁶⁰ Some prominent social scientists now claim that the rise in violence rates among the young can be partly attributed to this increase in violent programming.⁶¹

Former FCC Chairman Hundt had been one of the primary sources of criticism of the hands-off approach. According to Hundt, the public does not "accept the assertion that marketplace competition for audience and advertising revenues is all that should be asked from broadcasters in return for the privilege of holding a broadcast license."⁶² In his view, the public

56. See, e.g., *id.*

57. Hamilton, *supra* note 14, at 1177.

58. Hundt, *supra* note 12, at 1098.

59. See, e.g., NEWTON N. MINOW & CRAIG C. LAMAY, *ABANDONED IN THE WASTELAND* (1995).

60. Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527, 540 (1996).

61. *Id.*

62. Hundt, *supra* note 12, at 1094.

expects and demands more of the broadcasters than they have been given.

Therefore, the FCC, under Hundt's stewardship, attempted to right some of the wrongs brought on by letting the market determine what is in the "public interest."⁶³ In Hundt's view, a "broadcast license should be an explicit contract between the government and a broadcast television station incorporating clearly enunciated standards with which the FCC will determine license renewal."⁶⁴ Further, the former Chairman believes Congress has already established that the FCC should require broadcasters to act in the public interest in regard to educational programming for children, public affairs programming, and indecent and violent programming.⁶⁵

Specifically, Hundt believes the Children's Television Act (CTA), passed by Congress in 1990, serves as an example of how a broadcaster must act in the public interest. The Children's Television Act is especially important in relation to an AIDS education requirement because it establishes positive standards that a broadcaster must meet in order to comply with the public interest mandate. An AIDS education requirement would similarly require positive standards.

A. *The Children's Television Act of 1990*

The Children's Television Act of 1990 set out the basic requirements for broadcasters in regard to children's programming. The Act "places time restrictions on advertising during children's programming, requires broadcasters to make an effort to air programming that benefits children, and informs broadcasters that at license renewal time compliance with these factors will be considered as part of their duty to program in the public interest."⁶⁶ Former Chairman Hundt's interpretation of this Act requires broadcasters to establish a set number of hours per week of educational programming. The FCC would monitor the stations' programming, and any broadcaster not fulfilling the minimum hours of educational programming for children would be deemed as violating the public interest requirement set forth in the Communications Act.⁶⁷

Determining that the FCC has a right to promote certain kinds of programming, Hundt noted: "[N]othing in the First Amendment forbids government from 'promot[ing] programming that helps children . . .'"⁶⁸ In

63. Hamilton, *supra* note 14, at 1177-78.

64. *Id.* at 1177.

65. *Id.* at 1178.

66. Diane Aden Hayes, *The Children's Television Hour Revisited: The Children's Television Act of 1990*, 46 FED. COMM. L. J. 293, 296 (1995).

67. Hundt, *supra* note 12, at 1111.

68. Hundt, *supra* note 60, at 541 (alteration in original).

fact, according to Hundt's view and that of noted constitutional scholar Cass Sunstein, one of the main purposes of the First Amendment is to promote the education of citizens.⁶⁹

Courts traditionally have not supplied the same level of constitutional scrutiny to government regulation of broadcasters as they have other media.⁷⁰ According to the U.S. Supreme Court in *FCC v. League of Women Voters*,⁷¹ "because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve 'compelling' governmental interests."⁷²

Moreover, in *Red Lion Broadcasting Co. v. FCC*,⁷³ the Court firmly established that the government has more leeway in controlling the actions of broadcasters as opposed to other media outlets, such as the print media. According to the Court, the broadcasting spectrum is extremely scarce, with too many individuals wanting licenses for the available space. Consequently, those chosen to be licensed broadcasters are to some degree "licensed proxies" for the entire community and should serve the community's public interest.⁷⁴ Furthermore, because Congress allowed the broadcast spectrum to be given away for free, the broadcasters were the beneficiaries of a huge public subsidy. A broadcaster accepting a portion of the scarce broadcast spectrum is therefore "burdened by enforceable public obligations."⁷⁵

However, even restrictions on broadcasters have been required to at least be narrowly tailored to further a substantial governmental interest.⁷⁶ Thus, regulations such as the CTA must be narrowly tailored and designed to further a substantial governmental interest. Regarding the CTA, the government clearly has a strong interest in protecting the nation's children from harm. Likewise, the way the law is established, the broadcasters have a substantial amount of choice as to what to broadcast and when.⁷⁷ Therefore, given that the law is not overly burdensome on broadcasters, it is

69. *Id.*

70. *Id.* at 554.

71. *League of Women Voters*, 468 U.S. 364 (1984).

72. *Id.* at 376.

73. *Red Lion*, 395 U.S. 367 (1969).

74. *Id.* at 389.

75. *Id.* at 383.

76. See Christopher S. Lentz, Note, *The Fairness in Broadcasting Doctrine and the Constitution: Forced One-Stop Shopping in the "Marketplace of Ideas"*, 1996 U. ILL. L. REV. 271, 288.

77. See Julia W. Schlegel, Note, *The Television Violence Act of 1990: A New Program for Government Censorship?*, 46 FED. COMM. L.J. 187, 204 (1995).

likely to be viewed by the courts as being "narrowly tailored," and as a result it is highly probable that it would pass constitutional muster.⁷⁸

In addition to the *Red Lion* decision, the Supreme Court in *Turner Broadcasting, Inc. v. FCC*⁷⁹ determined that "'broadcast programming . . . is subject to certain limited content restraints imposed by statute and FCC regulation.'"⁸⁰ Former Chairman Hundt advocated that this notion of "limited content restraint" further allows the FCC to require broadcasters to furnish a certain number of hours of educational programming per week.⁸¹

Finally, the Supreme Court has traditionally found viewpoint-based regulations unconstitutional. For example, if the government were to encourage certain speech that it prefers, such as favoring one political party over another, then the law would most certainly be unconstitutional.⁸² However, in the case of the Children's Television Act, the FCC is doing no such thing. As noted by Hundt, "The rule would say nothing about the educational subject of the programming or the ideas presented. It would merely apply to broadcasters the public obligations that come with the license they are granted, and would likely be upheld by the courts."⁸³

B. *The Public Interest and AIDS Education*

Until recently, the FCC has required little of broadcasters in order to fulfill the public interest stipulation of their license renewal process. However, former Chairman Hundt advocated holding broadcasters to a more stringent public interest standard.⁸⁴ A positive requirement that broadcasters undertake an AIDS education initiative in order to renew their broadcast license serves as a legitimate and important way in which the FCC can continue to improve broadcasters' attempts to more appropriately serve the public interest needs of their communities.

At the present time, the AIDS epidemic in this country is in desperate need of a more effective education initiative. The broadcasters are in a special position to help facilitate this needed initiative. Through a variety of programming options, the broadcasters can provide education about AIDS to a wide spectrum of individuals.

Given that the FCC has the ability to require broadcasters to act in the

78. *Id.* at 204.

79. *Turner*, 512 U.S. 622 (1994).

80. Hundt, *supra* note 12, at 1116 (quoting *Turner*, 412 U.S. at 649).

81. *Id.*

82. Schlegel, *supra* note 77, at 205-06.

83. Hundt & Kornbluh, *supra* note 11, at 22.

84. Hamilton, *supra* note 14, at 1177.

public interest in order to have their license renewed, it is imperative that the agency now exercise its authority to push the broadcasters to cooperate in the war against AIDS. As former Chairman Hundt noted, now is the perfect time to reevaluate what constitutes acting in the public interest. Perhaps if the broadcasters are not supportive of providing for the public interest, then the FCC should auction portions of the new digital spectrum—rather than simply give them away. Positions on the digital spectrum certainly will be highly valuable commodities. Auctioning them off rather than giving them away would take away any obligations the broadcasters have to work in the public interest, but it would also impose a heavy financial burden upon them.⁸⁵ Undoubtedly, most of the parties involved would like to avoid forcing the FCC to auction licenses on the digital spectrum; however, it is worth noting that if the broadcasters remain adamant about not working for the public interest, then this option still remains open to the FCC.⁸⁶

As was true with the Children's Television Act, the FCC has constitutional authority to ensure that a broadcaster is acting in the public interest before granting a renewal for a license. Thus, as part of a public interest stipulation, the FCC could require that the broadcaster engage in an AIDS education program. Since the broadcast medium is subject to a less rigorous standard than other forms of media, an FCC AIDS education requirement would only have to be narrowly tailored to meet a substantial government interest.⁸⁷

In the case of AIDS education, there is no question that informing the public about AIDS prevention is a substantial government interest. The government most certainly has an interest in stopping the spread of a deadly and incurable disease. Moreover, the Court has afforded the government substantial deference when promulgating standards that are engineered to protect the public health and welfare.⁸⁸ Additionally, a properly drafted AIDS education requirement would be narrowly tailored. Like the CTA, an AIDS education requirement would allow an individual broadcaster a great amount of choice to decide what information to broadcast, and when and how to implement the information into its schedule. This freedom of choice would not unduly burden the broadcaster. Thus, as long as broadcasters are not unduly burdened, it is likely that this type of requirement would meet a constitutional balancing test.

Finally, it is probable that this type of regulation would not be view-

85. Hundt, *supra* note 60, at 543.

86. *Id.* at 547.

87. *Id.* at 545-46.

88. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

point specific. In this case, the FCC is not preferring one type of speech over another. If the FCC told broadcasters that they must not advocate abstinence over safe sex, then this would potentially violate the broadcasters' First Amendment rights. However, if the FCC allows broadcasters a good deal of autonomy in what specific message they want to deliver, and how they want to deliver it, then it likely would be constitutional.

Essentially, in the case of AIDS education, the FCC could simply inform broadcasters that they need to undertake some form of an AIDS education initiative in order to act in the public interest. Thus, there is a good chance that an AIDS education policy would pass constitutional muster, just as it is likely that the Children's Television Act provisions would.

IV. PROBLEMS WITH REQUIRING BROADCASTERS TO PARTICIPATE IN AN AIDS EDUCATION INITIATIVE

While requiring a broadcaster to provide a certain amount of AIDS education programming would be beneficial to the public, it could create some problems as well. First, many would vigorously oppose properly educating the public about how to prevent the spread of the HIV virus. Thus, without specific legislation from Congress, there is some doubt as to the authority of the FCC to hold the broadcasters to such a high public interest standard. Second, this type of broad mandate to require the broadcasters to act in the public interest could open the door to government censorship of unpopular viewpoints. Many legitimately fear that once the government starts telling broadcasters what to air, it will be difficult to know where and how to draw the line in the future.

A. *The Lack of a Congressional Mandate Requiring Broadcasters To Provide AIDS Education*

Unlike the Children's Television Act and educational programming for children, there is no congressional mandate requiring broadcasters to air AIDS educational programming. This lack of congressional support for what qualifies as the public interest could prove to be especially problematic for AIDS education initiatives.

First, it is clear that any FCC action asking broadcasters to air programming to help educate the public about the HIV health crisis would meet with widespread resistance from members of the religious right. Conservative activists up to this point have vigorously opposed AIDS education initiatives around the country. Since the start of the AIDS epidemic, they have been enormously successful at keeping sex education out of the

public schools⁸⁹ and at applying pressure on broadcasters neither to air condom advertisements,⁹⁰ nor to promote safe sex themes other than abstinence, nor to present any form of "alternative lifestyle" involving gays or lesbians.⁹¹ These activists claim that by promoting safe sex, society appears to promote promiscuous behavior. However, as Michael Merson of the WHO points out, "[t]he strong evidence that sex education in schools leads to safer sex, including an increase in condom use and a decrease in the number of sexual partners, needs to be acted upon and not feared."⁹²

Despite what may seem to be strong evidence that a safe sex message will help to stem the tide of risky sexual behavior, it is certain that those who thus far have opposed a positive safe sex message will actively oppose an FCC attempt to require broadcasters to provide the public with AIDS education. Without legislation on the matter, these activists will be able to claim that the FCC is overstepping its authority in trying to determine what is in the public interest. Moreover, they will most likely argue that any attempt by the FCC to impose a nationwide AIDS education campaign will infringe upon their own personal values. These arguments could cause the FCC much delay in implementing a strategy unless they are appropriately handled. Additionally, conservative religious activists could even try to raise a claim that such a requirement would violate their free exercise of religion. However, traditionally the Supreme Court has not found free exercise claims particularly persuasive when the public health is

89. Recently in Idaho, local conservative activists were able to convince the state school superintendent to ban the teaching of sex education in all public schools. Any school teaching any form of sex education besides abstinence will lose all state funding. David Woolsey, *Fox Sets Strict AIDS Education Rules*, IDAHO STATESMAN, Nov. 27, 1996, at 1B.

90. Currently only five network affiliate stations nationwide and a handful of cable networks, including MTV, allow condoms to be advertised on television. *See Reidy, supra* note 54.

91. Television programs dealing with gay and lesbian issues often draw fire from conservative activists. For example, the disclosure that television star Ellen Degeneres, the lead actress on the ABC sitcom *Ellen*, is a lesbian prompted a very negative reaction from religious conservatives. The Reverend Jerry Falwell, an outspoken Virginia minister who is also an active Republican political activist and the founder of Liberty University, went so far as to refer to the star as "Ellen DeGenerate" in an interview. Further, Degeneres's plan to have her on-screen character, Ellen Morgan, come out as a lesbian on the show's April 30, 1997 episode prompted J.C. Penney, Chrysler, and Wendy's to pull their advertising from the program for fear of offending "family viewers," and also led a Birmingham, Alabama ABC affiliate to drop the network sitcom from its evening programming because the show's lesbian theme did not comport with "traditional family values." However, both ABC and the Walt Disney Company, which owns the network, initially remained supportive of both Degeneres and her program, despite the outcry from conservative activists. *See Brian Lowry, Alabama Station Says No to 'Outing' Episode of 'Ellen'*, L.A. TIMES, Apr. 11, 1997, at F2.

92. Merson, *supra* note 39, at 1673.

at issue.⁹³

In addition to objections from religious conservatives, an AIDS education requirement could pose problems for the FCC leadership unless congressional support is first garnered. Former FCC Chairman Hundt was very active in advocating that broadcasters need to act in the public interest in order to have their licenses renewed. However, he was much more comfortable in implementing requirements, such as the CTA, which Congress already had obligated broadcasters to meet for license renewal.

According to Hundt's understanding of the public interest, it is best to have unambiguous requirements of broadcasters.⁹⁴ Congressional mandates would help provide this clear-cut definition of a requirement. However, it is important to note that Hundt has never openly expressed an opinion that the FCC could not implement regulations that require broadcasters to meet a public interest standard without a specific congressional mandate. In fact, he stated: "These [public interest requirements] could be determined by Congress or, as is currently the case, by a mixture of law and regulation."⁹⁵ Thus, under this view, the FCC could implement regulations requiring broadcasters to meet certain defined public interest obligations, such as requiring broadcasters to promote AIDS education and awareness, without first having legislation specifically calling for the FCC to do so.

Regardless of the legality of the FCC's promulgation of regulations without a congressional mandate to do so, it is both politically and legally wise to get Congress to back such an initiative before the FCC implements regulations on the matter. Without this congressional support, the FCC will open itself up to charges that it is overstepping its authority from those opposed to an AIDS education requirement. Moreover, this could lead to numerous lawsuits that could needlessly delay the implementation of such a plan. Thus, if such a requirement is to be successful, it is in the FCC's best interest first to encourage Congress to pass legislation to this effect. While the current makeup of Congress suggests that getting such a bill through Capitol Hill would be difficult, with the right combination of support from AIDS activists, the White House, the FCC, and key congressional leaders of both parties, it would be possible. Certainly the FCC could implement an AIDS education policy without such legislation; however, it would be beneficial for all involved first to have congressional support.

93. See *Jacobson*, 197 U.S. at 29.

94. Hundt, *supra* note 12, at 1096.

95. Hundt, *supra* note 60, at 539.

B. *Fears of Censorship*

Broadcasters have long been subject to greater governmental control than any other form of communication. Since the development of the first radio signals, more people have wanted to broadcast through radio and television than the broadcast spectrum allows. As a result, the government established the FCC to regulate broadcasters. Through the years, the FCC has entrusted broadcasters with precious and scarce space on the broadcast spectrum for free, and in return the government has imposed clear standards upon broadcasters, including a requirement that they act in the public interest. However, many believe that these standards and regulations are too intrusive. In fact, some believe that requiring the broadcasters to act in the public interest violates the First Amendment and could give the FCC power to censor unpopular views. Since the establishment of the FCC and its standards for broadcasters, the clear precedent of the Supreme Court has strongly supported the public interest mandate of the broadcasters, casting into doubt these censorship fears.

Traditionally, the Supreme Court has been willing to allow governmental regulation of broadcasters in ways that would clearly violate the First Amendment rights of the print media and even cable operators.⁹⁶ Without question, the government cannot tell a newspaper that it must act in the public interest when choosing what stories to publish, or force a paper to print viewpoints that are different from that of the publisher. The unique regulatory approach for broadcasters began after the development of radio communications in the early part of this century. When the first radio stations were established, there were no clear rules on spectrum transmission, so radio frequencies often interfered with one another. With so many different transmitters of radio signals, no one could effectively be heard. In response, Congress passed the Radio Act of 1927 to help divide the limited radio spectrum space, and thus allocated portions of the scarce broadcast spectrum.⁹⁷ Seven years later, Congress passed the Communications Act of 1934 which formally established the FCC and officially authorized it to regulate the broadcast spectrum.⁹⁸

Under the terms of the 1934 Act, the FCC is authorized to license broadcasters before they are allowed to transmit a signal on the broadcast spectrum. Broadcasters are given portions of the broadcast spectrum for free, as long as they operate in the "public interest, convenience, and ne-

96. John J. Watkins, *Lawyer Advertising, the Electronic Media, and the First Amendment*, 49 ARK. L. REV. 739, 751 (1997).

97. *Id.*

98. See William H. Read & Ronald Alan Weiner, *FCC Reform: Governing Requires a New Standard*, 49 FED. COMM. L.J. 289, 293 (1997).

cessity.”⁹⁹ As a result of the broadcast spectrum being so limited (spectrum scarcity), and because the broadcast spectrum is an important public resource, Congress gave the FCC the power to regulate the actions of broadcasters to make sure they properly use this valuable public trust.

The Supreme Court upheld the validity of the spectrum scarcity rationale in its 1943 decision, *National Broadcasting Co. v. United States*.¹⁰⁰ In this decision, Justice Frankfurter noted “the radio spectrum simply is not large enough to accommodate everybody Freedom of utterance is abridged to many who wish to use the limited resources of radio Because it cannot be used by all, some who wish to use it must be denied.”¹⁰¹ Thus, because the government must allocate a limited number of broadcast frequencies, a process which is unnecessary with other forms of communication such as the print media, it is justified in imposing a public interest mandate upon broadcasters. Under this scarcity approach, broadcasters are expected to act as guardians of the public trust they were given.

In 1949, the FCC broadened its understanding of the scarcity rationale and developed the Fairness Doctrine as a means to further promote the public interest.¹⁰² Under the terms of this regulation, broadcasters were given a two-prong obligation. First, they were required to devote broadcast time to issues of public importance—specifically issues of vital interest to the local community.¹⁰³ Second, broadcasters were required to present the range of opposing viewpoints to the issues covered, if so requested. Thus, broadcasters were under a legal obligation not only to promote issues of importance to the community, but also to allow those who disagreed with their portrayal of the issues to broadcast their own viewpoint. Since the broadcast spectrum was so scarce and not all who wanted to express their views and opinions could, the FCC determined that the Fairness Doctrine would allow those persons with divergent views to express their beliefs via the limited public broadcast spectrum.¹⁰⁴

The Supreme Court upheld the constitutionality of the Fairness Doctrine and once again reaffirmed the validity of the scarcity rationale in its 1969 *Red Lion* holding.¹⁰⁵ This case involved a direct attack on the soundness of the Fairness Doctrine. In November of 1964, Red Lion Broadcast-

99. Communications Act of 1934, Ch. 652, § 309(a), 48 Stat. 1064 (codified as amended at 47 U.S.C. § 309(a) (1994)); see also, Fred H. Cate, *The First Amendment and the International 'Free Flow' of Information*, 30 VA. J. INT'L L. 372, 397 (1990).

100. *NBC*, 319 U.S. 190 (1943).

101. *Id.* at 213, 226.

102. See Cate, *supra* note 99, at 389.

103. See Lentz, *supra* note 76, at 277.

104. *Id.* at 271.

105. *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367 (1969).

ing Company produced a program in which the Reverend Billy James Hargis viciously attacked Fred Cooke, the author of a highly critical biography of Republican Presidential Nominee Barry Goldwater.¹⁰⁶ Following the program, Cooke asked Red Lion to allow him to rebut the charges on-the-air, as the Fairness Doctrine required. However, the broadcaster steadfastly refused. Cooke appealed to the FCC for help, and they ordered Red Lion to give him on-the-air rebuttal time.¹⁰⁷ On review of the FCC decision, the Supreme Court upheld the validity of the FCC Order, as well as the constitutionality of the Fairness Doctrine as a whole. According to Justice White, speaking for the *Red Lion* majority:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.¹⁰⁸

Thus, through this decision, the Court affirmed the validity of the FCC regulatory scheme. Moreover, the Court found nothing wrong in requiring broadcasters to meet certain public interest duties, even if that meant curtailing some of the First Amendment protection that other media enjoyed. Essentially, the Court recognized that the First Amendment not only protects an individual's right to say what they want, but that it also protects the right of the public to have access to a free flow of ideas through the scarce public broadcast spectrum.

During the early 1980s, under the deregulatory fervor of the Reagan administration, the FCC began to back away from its promotion of the Fairness Doctrine.¹⁰⁹ In 1985, the FCC published the Fairness Report, that determined that the doctrine no longer effectively and appropriately served the public interest.¹¹⁰ In response, Congress passed a bill in 1987 which codified the Fairness Doctrine; however, President Reagan promptly vetoed the bill. Later in the same year, the FCC formally repealed the Fair-

106. See Lentz, *supra* note 76, at 278.

107. Watkins, *supra* note 96, at 753.

108. *Red Lion*, 395 U.S. at 390 (citations omitted).

109. See Lentz, *supra* note 76, at 281.

110. Inquiry into Section 73.1910 of the Comm'n's Rules and Regs. Concerning the General Fairness Doctrine Obligations of Brdcst. Licensees, *Report*, 102 F.C.C.2d 142, 58 Rad. Reg. 2d (P & F) 1137 (1985) (proceeding terminated).

ness Doctrine in *Syracuse Peace Council v. WTVH*,¹¹¹ determining that the doctrine actually had a chilling impact on speech.¹¹² Later attempts to codify the Fairness Doctrine into law failed to gain the necessary votes in Congress.¹¹³

Despite the FCC's decision to back away from implementing the Fairness Doctrine, the agency retains the right to regulate broadcasters more strictly than it regulates other media. The Court's *National Broadcasting Company* and *Red Lion* decisions supported expansive and constitutionally protected regulatory powers for the FCC.¹¹⁴ However, the scarcity of the broadcast spectrum justifies this added regulatory muscle. Today, some question the scarcity rationale because great advances in technology have vastly improved the range of the broadcast spectrum, allowing many more broadcasters to send signals than was possible earlier this century.¹¹⁵ Although, despite these advances, there still are many more persons who would like to broadcast than there is space in the spectrum. Thus, spectrum scarcity remains a legitimate public concern today.

In allowing the broadcasters to use portions of the public broadcast spectrum for free, the FCC simply asks that broadcasters take the public interest into account. Other communication forms, such as the print media, do not have the same scarcity problem. For example, if someone wants to print a newspaper, the existence of another newspaper does not physically prevent their production. Therefore, because the broadcast spectrum presents unique space constraints unlike those presented to other communication forms, other communicators are not subject to the public interest mandate imposed on broadcasters.¹¹⁶ Moreover, even with the additional public interest requirement to which broadcasters are supposed to adhere, the FCC and the government may not directly nor indirectly censor. A series of well-defined checks and balances exists that protects the free speech of

111. Complaint of Syracuse Peace Council Against TV Station WTVH, *Memorandum Opinion and Order*, 2 FCC Rcd. 5043, 63 Rad. Reg. 2d (P & F) 541 (1987), *reconsideration denied by Memorandum Opinion and Order*, 3 FCC Rcd. 2035, 64 Rad. Reg. 2d (P & F) 1073 (1988), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

112. *Id.* para. 4.

113. These attempts were dubbed the "Hush-Rush" bill by its opponents who felt that the only reason the legislation was being introduced was to try to curb the growing popularity of Rush Limbaugh. Many members of the new Republican majority in the 104th Congress partially credited this conservative talk-show commentator with their 1994 election victory. See Roland F. L. Hall, *The Fairness Doctrine and the First Amendment: Phoenix Rising*, 45 MERCER L. REV. 705 (1994).

114. Read & Weiner, *supra* note 98, at 300.

115. *Id.* at 295.

116. See Lentz, *supra* note 76, at 282.

broadcasters from government censorship attacks.

First, the government cannot constitutionally support one viewpoint at the expense of another. The Supreme Court has actively opposed any attempt by the government to engage in viewpoint discrimination.¹¹⁷ For example, the FCC could not tell a broadcaster that he must promote abstinence over safe sex, any more than it could force a broadcaster to carry the Rush Limbaugh show. The FCC simply cannot censor an unpopular viewpoint, no matter how compelling the reason. Therefore, any FCC attempt to regulate the broadcasters will have to be promulgated with this principle in mind. Consequently, the Constitution does provide protection from any attempt by the FCC to abuse its authority and impose a certain viewpoint on broadcasters.¹¹⁸

Additionally, FCC actions imposing regulations on broadcasters must be narrowly tailored to further a substantial governmental interest.¹¹⁹ Thus, the FCC will only be able to promulgate regulations for which the courts feel the government has a substantial need. Moreover, the courts will check any attempts by the FCC to overstep its authority and promulgate regulations which intrude on the rights of others.

As a result of these constitutional checks on the FCC's authority, it is unlikely that the FCC will be able to implement regulations that censor unpopular viewpoints or that impose certain viewpoints on others. Broadcasters serve as guardians of an important public trust—the broadcast spectrum. The public interest requirement only helps to ensure that they properly protect this public resource. Moreover, in its regulatory attempts, the FCC will only be able to act in accord with well-established constitutional principles that have proven to be highly protective of free speech, even with broadcasters.

V. CONCLUSION

The HIV health crisis has had, and will continue to have, a devastating effect on our society. Despite health officials' best attempts to educate the public as to the dangers of infection, the national and global infection rate continues to escalate. Moreover, discrimination against those with HIV continues to run rampant. This discrimination hampers attempts to educate properly the public about the disease.

As a result of outside pressures, broadcasters have been reluctant to help assist in the war against AIDS. However, the FCC and broadcasters

117. Hundt, *supra* note 60, at 544.

118. *Id.*

119. *Id.* at 545.

could play a key role in helping to curtail the spread of this deadly virus. Currently, broadcasters are required to act in the "public interest" before having their broadcast licenses renewed. While in the past the FCC has not aggressively required broadcasters to meet this public interest obligation, the time has come for it to do so. With the help of Congress, the FCC should require broadcasters to promote aggressively AIDS education through their programming, news, and public service announcements. Television impacts virtually every aspect of our lives, and the AIDS education effort will not be wholly successful unless broadcasters support it. Such an obligation requires precious little of broadcasters, but would go a long way toward saving lives.

